SUPREME COURT, U. S.
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No. 73-840

In the Supreme Court of the United States

OCTOBER TERM, 1973

THOMAS MICHAEL RIELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that his conviction for failing to report for induction should be reversed under the reasoning of the government's confession of error in *Joseph* v. *United States,* 405 U.S. 1006, because his claim to exemption as a conscientious objector was denied by the local board without a statement of reasons.

Following a jury-waived trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of having failed to report for induction, in violation of 50 U.S.C. App. 462. He was sentence to three years' imprisonment. The court of appeals affirmed (Pet. App. A 1a-9a).

Petitioner registered with the Selective Service System on June 1, 1964, and was classified II-S (A 11).[1] He did not claim to be a conscientious objector at that time (A 7).

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[1] "A" designates petitioner's Selective Service File.

After several renewals of his student classification, petitioner was classified I-A on November 17, 1966 (A 11), and was subsequently ordered to report for his physical examination on May 17, 1967 (A 11, 23). He reported as ordered and was found fully qualified for military service (A 28, 29).

On May 19, 1967, two days after his physical examination, petitioner filed Selective Service Form 150, application for classification as a conscientious objector (A 11, 25-27). On this form, petitioner stated that he was not a member of any religious organization but that he believed in a Supreme Being, and wrote: "I believe that man, as part of the universe, was created to live together and make achievements which will better the entire human race, and under no circumstances become involved in organized war" (A 24). In response to the question about the origin of his beliefs, petitioner wrote: "I acquired these beliefs in the fall of 1966, by deep thinking of the subject under the influence of mind expanding drugs" (A 25). He stated that he relied on no one for religious guidance and that he had never made any public expression of his conscientious objector beliefs. He described the actions and behavior that most conspicuously demonstrated the consistency and depth of his religious convictions as "[a] non-violent way of life. A rejection of violence, out of love" (A 25). Petitioner stated that he believed in the use of non-violent force, when the results were beneficial to mankind, but that he did not believe in organized violent force such as that used by armies in war (A 25). He identified his brother and a friend as persons who could attest to the sincerity of his beliefs.

On August 29, 1967,[2] the local board, without comment, again classified petitioner I-A (A 11). Petitioner requested a personal appearance and appeal (A 11, 47-48), and a personal appearance was scheduled for November 21, 1967 (A 50). On November 17, 1967, the local board received a letter from petitioner in which he stated that he would be unable to attend the November 21 appearance because he would be out of town on that date. Petitioner requested another appearance date (A 51). His personal appearance was re-scheduled for February 20, 1968 (A 53). By letter dated February 18, 1968, petitioner's mother informed the board that petitioner was away at school and would be unable to appear on February 20, 1968, as scheduled (A 54).

The selective service file reveals no further communication between petitioner and the local board until March 18, 1969, when the local board forwarded petitioner's file to the appeal board and informed petitioner of this action (A 11, 56). Petitioner submitted no additional information, and on July 8, 1969, the appeal board, without comment, classified petitioner I-A (A 11, 57).[3] The file was returned to the local board and, after one delay at his request, petitioner was ordered to report for induction on October 28, 1969 (A 87). On that date petitioner failed to report as ordered, and his indictment and conviction followed.

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[2]The court of appeals opinion incorrectly states that this action occured on August 19, 1967 (Pet. App. 8a-9a).

[3]When informed of the appeal board's action, petitioner wrote to the local board and complained that he had been denied a personal appearance (A-58). In response, his file was forwarded to the state director (A-69), who reviewed the actions of the local board and found them unobjectionable (A-70).

1. In *Joseph* v. *United States*, remanded for reconsideration in light of the Solicitor General's position, 405 U.S. 1006, we acknowledged that when a registrant presents a *prima facie* claim for exemption as a conscientious objector, a statement of the reasons for rejection of the claim is essential for adequate administrative and judicial review, and that the failure to provide such a statement of reasons would vitiate a subsequent induction order (G. Mem. 12-14).[4] We further conceded in *Joseph* that, although we did not believe that *Joseph* had presented a *prima facie* claim, "we [thought] it more likely that the board * * * did initially determine (albeit erroneously) that petitioner *prima facie* qualified for conscientious objector status, but denied his claim on grounds of insincerity" (G. Mem. 19-20). This conclusion was compelled by the fact that the local board reopened Joseph's classification--a procedure which it was not supposed to employ in the absence of a finding that the claim was *prima facie* valid, 32 C.F.R. 1625.4, and by the fact that Joseph's file disclosed grounds for questioning his sincerity (G. Mem. 20-21). Considering both the ambiguous nature of Joseph's claim and the evidence concerning insincerity, we felt constrained by the presumption of administrative regularity, in the particular circumstances of that case, to treat Joseph's claim as *prima facie* valid, and the board's decision as based on the conclusion that Joseph was insincere. We therefore conceded that the failure to provide a statement of reasons for the classification rendered the reclassification invalid (G. Mem. 19-20).

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[4]"G. Mem." refers to the government's memorandum on the merits in *Joseph* v. *United States*, No. 70-251.

However, we explicitly stated that our concession would not apply in all situations of failure to state reasons for a classification. We said (G. Mem. 20-21):

> We might feel otherwise if it could be argued here that there were no grounds for questioning petitioner's sincerity, so that the only determination that could possibly have been made on this record was that petitioner's claim did not meet the statutory criteria. In such a situation the board's decision, whether characterized as a refusal to reopen or as a denial of exemption after reopening would necessarily have been based on a determination that petitioner was not *prima facie* entitled to conscientious objector status. Consequently, it would not have been obliged to state reasons [citations omitted].

The court of appeals here correctly concluded that petitioner's claim for conscientious objector deferment was clearly insufficient on its face and that the board did not deny his claim on grounds of insincerity.[5]

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[5]In *Joseph*, as here, the board denied the registrant's claim before granting him an interview. But Joseph's file indicated that a classification questionnaire he submitted almost a year after he became a Muslim did not state that he was a conscientious objector, and he did not assert late crystallization. He had also expressed an interest in service in the Armed Forces in the course of an interview to determine his psychological fitness for service about four months before claiming conscientious objector status. He submitted no references or letters attesting to his sincerity, and stated his religious convictions were evidenced by his ability to give up smoking (G. Mem. 21). In contrast, petitioner asserted that his beliefs crystallized in the fall of 1966, after his original registration in which he did not claim to be a conscientious objector. There were no inconsistent statements in his file, and he identified two persons who could attest to the sincerity of his beliefs. Thus, unlike *Joseph*, this is not a case in which the board could reasonably have concluded on the record before it, without a personal interview, that the registrant had presented a *prima facie* claim but was insincere.

The instant case thus comes within the exception to our concession in *Joseph*. Petitioner's arguments are fully answered in the opinion of the court of appeals, on which we here rely.[6]

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[6]In *Cale* v. *Volatile*, 465 F.2d 1110 (C.A. 3), the court of appeals reversed a denial of a writ of habeas corpus, holding that the Selective Service System processing of Cale was defective because the board gave no timely statement of reasons for denying his claim for an occupational deferment. The court accepted Cale's contention that "by virtue of the local board's reopening of his classification * * * we must conclude as a matter of law that the board found that a *prima facie* case had been established." 465 F.2d at 1116. It noted the contention had the "apparent endorsement of the Solicitor General," and concluded that [i]f this was the position taken by the government in confessing error in *Joseph* * * * basic maxims of equality of justice compel us to require the government to maintain a consistent position in the case at bar." *Id.* at 1117. We believe the court felt compelled to reach this conclusion only because it overlooked the reservation in our memorandum in *Joseph* noted above; had that reservation been pointed out, we believe the result would have been the same as in the instant case.

In any event, the Military Selective Service Act was amended in 1971 by the addition of a requirement that boards provide, on request, a statement of the reasons for any decision adverse to a registrant's claim. Pub. L. 92-129, 85 Stat. 353; 50 U.S.C. App. (Supp. 1972) 471a(b)(4). Therefore, even if the Third Circuit should adhere to its incorrect interpretation of our position in *Joseph*, only a limited number of cases involving pre-1971 board decisions, would be affected.

This same issue was involved in *Ford* v. *United States*, 478 F. 2d 169 (C.A. 1), certiorari denied, 414 U.S. 872, and our memorandum in opposition pointed out the apparent inconsistency of the First Circuit's holding in that case with *Cale* (Mem., p. 7). The Court nevertheless concluded that the issue did not warrant certiorari; we submit that the same conclusion is appropriate here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.